MALTA

COURT OF CRIMINAL APPEAL

THE HON. MR. JUSTICE -- ACTING PRESIDENT

DAVID SCICLUNA

THE HON. MADAM JUSTICE

ABIGAIL LOFARO

THE HON. MR. JUSTICE

JOSEPH ZAMMIT MC KEON

Sitting of the 31 st July, 2014

Number 16/2009

The Republic of Malta

v.

Morgan Ehi Egbomon

The Court:

1. This is an appeal from a judgement delivered by the Criminal Court on the 24th October 2012 regarding preliminary pleas raised by the accused Morgan Ehi Egbomon. The accused appealed by means of an application filed on the 25th October 2012.

2. Morgan Ehi Egbomon was accused, by means of a Bill of Indictment filed by the Attorney General on the 13th April 2009, of having (1) during the period between the 8th February 2007 and the 7th June 2007) rendered himself guilty of carrying out acts of money laundering by: i) converting or transferring property knowing or suspecting that such property is derived directly or indirectly from, or the proceeds of, criminal activity or from an act or acts of participation in criminal activity, for the purpose of or purposes of concealing or disguising the origin of the property or of assisting any person or persons involved or concerned in criminal activity; ii) concealing or disguising the true nature, source, location, disposition, movement, rights with respect of, in or over, or ownership of property, knowing or suspecting that such property is derived directly or indirectly from criminal activity or from an act or acts of participation in criminal activity; iii) acquiring, possessing or using property knowing or suspecting that the same was derived or originated directly or indirectly from criminal activity or from an act or acts of participation in criminal activity; iv) retaining property without reasonable excuse knowing that the same was derived or originated directly or indirectly from criminal activity or from an act or acts of participation in criminal activity; v) attempting any of the matters or activities defined in the above foregoing paragraphs (i), (ii), (iii) and (iv) within the meaning of Article 41 of the Criminal Code; vi) acting as an accomplice within the meaning of Article 42 of the Criminal Code in respect of any of the matters or activities defined in the above foregoing subparagraphs (i), (ii), (iii), (iv) and (v); (2) (during the period between the 1st

June 2007 and the 7th June 2007) rendered himself guilty of the offence of being a person entering or leaving Malta and who was carrying more than five thousand Malta Liri (Lm5000) (equivalent to Euro eleven thousand six hundred forty six eighty six cents (€11646.86)) and who failed to declare to the Comptroller of Customs on the appropriate form that he was carrying more than five thousand Malta Liri (Lm5000) (equivalent to Euro eleven thousand six hundred forty six eighty six cents (€11646.86)).

3. In his application of appeal, appellant requested that this Court reform the appealed judgement by confirming the order given about the deletion of the words "or suspecting that" and otherwise revoke the decision regarding the plea on the First Count and the plea on the Second Count and instead uphold both pleas.

4. By means of a note of pleas filed on the 20th April 2009, Morgan Ehi Egbomon pleaded:

> "Regarding the First Count
>
> "a. That the Bill of Indictment does not in any way indicate the antecedent offence, or source, which could give rise to money laundering, and consequently there is no antecedent *actus reus* on which to base the charge of money laundering; and the count is consequently null and void.
>
> "b. The charge as proferred violates the principles of a fair trial. The Attorney General is basing the charge of money laundering on the lack of a reasonable explanation coming from the accused, showing that such monies, properties or proceeds were not money, property or proceeds derived from a criminal activity. This presumption at Law violates the fundamental human rights of the accused, who has already proceeded before the Civil Court, First Hall to have it declared that article 3(3) of Chapter 373 of the Laws of Malta and Articles

22(1C)(b) of Chapter 101 of the Laws of Malta, are in violation of Article 6 of the European Convention on Human Rights.

"Regarding the Second Count

"a. The accused is raising the plea of *nullum crimen sine lege*. As transpires from the facts stated in the second count the alleged offence was committed between the 6th and 7th June, 2007. The Attorney General is charging on the basis of the regulations existing at the time that is to say Legal Notice 463/2004, named "Reporting of Cash Movements Regulations, 2004". By Legal Notice 149/2007 (as is clear from Section 6 thereof) Regulations 463/2004 were repealed. In Legal Notice 149/2007 there is no provision or a transitory clause or a saving clause for the continued prosecution of an offence committed before the coming into force of the new Regulations. The coming into force of the new regulations (and the repeal of the earlier regulations) was on the 15th June 2007.

"As may be seen from Chapter 238 the Act of Parliament was only giving powers to the Minister to make Regulations which were done both in 2004 by Legal Notice 463/2004, and a repealing Legal Notice 149/2007. Consequently the Law applicable under the second count has been repealed and therefore the principle applies of *nullum crimen sine lege*. This situation is not remedied for the prosecution by the Interpretation Act, which only saves Acts of Parliament and not subsidiary Legislation, which are clearly different."

5. On the 20th January 2010 appellant filed a note verbale (fol 61) where, with reference to paragraph "b" regarding the First Count, he stated that said paragraph did not raise any issue which fell to be decided by the Criminal Court.

6. On the 14th June 2012 appellant filed an additional note of pleas whereby he requested that the applicable law be that in force on the 7th June 2007 and not as subsequently amended, with particular reference to the words

"knowing or suspecting that ..." which element of suspicion was not in force at the time of the commission of this crime.

7. In its judgement regarding these pleas, the Criminal Court said:

> **"That as regards the first count, the accused is claiming that this is null and void because it does not in any way indicate the antecedent offence or source which could give rise to money laundering.**
>
> **"The accused is arguing that the Attorney General must at least prove *prima facie* that the money is coming from an illicit activity. If there is a shifting of the burden of proof, this must be accompanied by an illicit activity which illicit activity should show in the bill of indictment. In this case no previous offence was established, therefore there is no antecedent criminal act. The situation is very similar to the crime of receiving stolen property where there must be proof that the goods have a criminal origin. Therefore, in matters of money laundering, the Prosecution must prove the illicit origin of the money. The suspicion of a crime is not enough. It has yet to be established what is the predicate offence.**
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> **"Considers:**
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> **"It has to be stated from the outset that the narrative part of the bill of indictment is not evidence of its own contents. It is just an explanation given by the Attorney General to show why he deems it necessary to charge the accused with the crime of money laundering. The narrative still has to be proven in a Court of law and the Attorney General is not bound with the details of the narrative but only with the general theme of the narrative. He is, however, fully bound by the concluding paragraph of the charge from which there can be no deviation.**
>
> **"This means, therefore, that if according to the accused, the bill of indictment does not in any way indicate the antecedent offence, or source, this does not mean that evidence of this offence can not be brought during the trial. According to the guidelines given by the Court of Appeal in the case "Police**

versus Carlos Frias Matteo" of the nineteenth (19th) of January two thousand and twelve (2012), it was stated that:

"Ghalhekk, dan il-livell ta' prova *prima facie* japplika kemm ghall-persuna li tkun akkuzata b'money laundering taht il-Kap. 101 kif ukoll taht il-Kap. 373. Issa, peress illi l-artikolu 2(2)(a) tal-istess Att jezimi mir-responsabilta` lill-Prosekuzzjoni milli tipprova xi htija precedenti in konnessjoni ma' xi attivita` kriminali, kulma ghandha tipprova l-Prosekuzzjoni huwa illi l-flus illi nstabu fil-pussess tal-persuna ma kinux konformi mal-istil ta' ħajja tal-persuna, liema prova tkun tista' tiġi stabbilita anki minn provi indizjarji. Dan ifisser illi l-Prosekuzzjoni m'ghandhiex tipprova lill-Qorti l-origini tal-flus, lanqas jekk il-flus kinux illegali. Kulma trid tipprova huwa fuq grad ta' *prima facie* illi ma hemm l-ebda spjegazzjoni logika u plawsibbli dwar l-origini ta' dawk il-flus. Darba ssir din il-prova fil-grad imsemmi, ikun imiss lill-akkuzat sabiex juri illi l-origini tal-flus ma kinux illegali."

"This Court finds that the bill of indictment does provide a correct description of what happened and includes also the predicate offence. Here, the Attorney General did not fail to indicate what the *actus reus* was all about even though he does not have to prove any specific offence.

"This Court, therefore, finds that the narrative part of the first charge of the bill of indictment contains sufficient information for the accused to prepare for his defence, is drafted according to law and sees no reason why it should be declared null and void.

"For these reasons, therefore, the Court dismisses the first plea of the accused.

"Regarding the second plea, the Court makes reference to the *note verbale* of the twenty-ninth (29th) of January two thousand and ten (2010) (fol 61) and therefore abstains from taking any further cognizance of this plea.

"As regards the second charge, the accused is raising the plea of *nullum crimen sine lege*. The alleged offence was committed between the sixth (6th) and

seventh (7th) of June two thousand and seven (2007) and the Attorney General is charging on the basis of the regulations existing at the time, that is to say Legal Notice 463/2004 named "Reporting of Cash Movements Regulations, 2004". By Legal Notice 149/2007, Regulations 463/2004 were repealed. In Legal Notice 149/2007, there is no provision or transitory clause or a saving clause for the continued prosecution of an offence committed before the coming into force of the new regulations.

"Accused is claiming that Legal Notice 149/07 shifted the *ratio legis* to only a question of reporting movements of capital in certain situations. This is different from exchange control. When accused was held at the airport, the officers, then, confiscated the money on the basis of the exchange control act which was declared illegal, and repealed by Regulations 463/2004. What's more the situation is not remedied for the Prosecution by the Interpretation Act which only saves Acts of Parliament and not subsidiary legislation, which are clearly different.

"Considers:

"It is true that the law under which accused was charged – Legal Notice 149/07 – has since been repealed. And it is also true that the Legal Notice abovementioned does not contain any transitory provisions. So, in this case the Court believes that the Interpretation Act comes into force and does not agree with the argument of the accused that this Act refers only to Acts of Parliament and not subsidiary legislation. Article 2 of the Interpretation Act defines an Act. This definition is very wide and refers to an Act of Parliament and any other Act passed by the Legislature of Malta and includes any Code, Ordinance, Proclamation, Order, Rule, Regulation, Bye-Law, Notice, or other instrument having the force of law in Malta ... . Article 12 of the Interpretation Act states that where any Act passed after the commencement of this Act repeals any other law, then, unless the contrary intention appears ... shall not affect the previous operation of a law so repealed ... as if the repealing Act had not been passed."

"This law is very clear and not subject to any interpretation, which means that the accused may be charged and tried according to the law which was in force

> **at the time of the commission of the offence, and this is the law under which accused is being charged.**
>
> **"This Court does not see anything illegal on this count and therefore dismisses the plea raised regarding the second charge.**

8. Appellant appealed from this judgement in so far as it dismissed these pleas.

9. During the sitting of the 4th July 2013 appellant's counsel registered the following:

> *"Dr Brincat is raising the question of Article 7 of the Convention regarding the discretion of the Attorney General regarding article 3 of the Money-Laundering Act and as explained the violation of Article 6(2) on the shifting of the burden of proof as an excessive burden".*

10. During oral submissions counsel for appellant made it clear that he was not requesting a constitutional reference but was merely bringing all this to the Court's attention.

11. In respect of the question relating to Article 7 of the European Convention on Human Rights, this Court feels that it is sufficient to refer to the most recent pronouncement on the matter by the First Hall of the Civil Court in its Constitutional Jurisdiction in the case **Charles Steven Muscat vs Avukat Generali** decided on the 27th June 2014. In that case applicant was seeking a declaration that article 22(2) of Chapter 101 of the Laws of Malta which accorded the Attorney General a discretion to determine the punishment to which an accused person could be subjected as being in breach of article 6 and 7 of the European Convention on Human Rights, and as a remedy the issuing of a counter-order by the Attorney General. The Constitutional Court deemed the

requests based on article 7 as being untimely and further dismissed the requests in so far as based on article 6.

12. As to the question of reverse onus of proof, this does not inevitably give rise to a finding of incompatibility with the Convention. The approach of the European Court to reverse onus provisions is clearly set out in Salabiaku v France (7 October 1988) (at para.28):

> **"Presumptions of fact and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law.**
>
> **[…]**
>
> **"Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. This test depends upon the circumstances of the individual case."**

13. In other words Article 6(2) cannot be seen as imposing an absolute prohibition on reverse onus clauses. What is required is that a fair balance is struck between the demands of the general interest of the Community and the protection of the fundamental rights of the individual.

14. Now, regarding his plea relating to the First Count appellant states:

> "It is true that the Court stated that the applicant is right when in an explanatory note he stated that the element of suspicion could not be

> introduced in this particular case. But the plea goes even further – because the bill of indictment should have indicated what in the opinion of the Attorney General is the antecedent offence. This was the crux of the first plea regarding the first count.
>
> "Otherwise, the burden of proof of innocence is completely shifted on the accused as the bill of indictment stands. It was the duty of the prosecution to individualise, at least according to the law prevailing at the time, what was the crime from which the proceeds were being laundered.
>
> "With all due respect, the Criminal Court did not enter into the merit of this plea."

15. First of all this Court must point out that article 2(2)(a) of Chapter 373 of the Laws of Malta, as it stood at the time when the money-laundering offence with which appellant has been charged allegedly took place, provided:

> **"A person may be convicted of a money laundering offence under this Act even in the absence of a judicial finding of guilt in respect of the underlying criminal activity, the existence of which may be established on the basis of circumstantial or other evidence without it being incumbent on the prosecution to prove a conviction in respect of the underlying criminal activity."**

16. It was by means of article 59(b) of Act VII of 2010, that the words "criminal activity." were substituted with the words "criminal activity and without it being necessary to establish precisely which underlying activity." Yet by means of Legal Notice 176 of 2005 the Second Schedule of Chapter 373 of the Laws of Malta was amended such that "criminal activity" was to refer to "any criminal offence" and individual criminal offences were no longer specified in the Schedule (as was the case when the judgement **Ir-Repubblika ta' Malta v. John Vella** decided on the 26th November 1999 by this Court differently composed, and to which appellant referred, was delivered).

17. In any case in its judgement the first Court did conclude **"that the bill of indictment does provide a correct description of what happened and includes also the predicate offence."**

18. It is also true that article 22(1C)(b) of Chapter 101 of the Laws of Malta is applicable to proceedings under Chapter 373 (see article 3(3) of said Chapter 373) and that this article provides:

> **"In proceedings for an offence under paragraph (a), where the prosecution produces evidence that no reasonable explanation was given by the person charged or accused showing that such money, property or proceeds was not money, property or proceeds described in the said paragraph, the burden of showing the lawful origin of such money, property or proceeds shall lie with the person charged or accused."**

19. Nonetheless the following principles, as clearly outlined by the Constitutional Court in its judgement of the 1st April 2005 in the case **The Republic of Malta vs Gregory Robert Eyre and Susan Jayne Molyneaux**, must be applied:

> **"(i) it is for the prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the prosecution, to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be**

satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence."

20. Consequently this Court finds no reason to vary the first Court's conclusion that it did not find the bill of indictment null and void. Thus appellant's first grievance is dismissed.

21. Regarding his grievance relating to the Second Count appellant states:

"It is apparent that the Court agrees with the defence that there was an interim period when actually there were no regulations. The alleged offence was committed between the 6th and 7th June 2007. The Attorney General was charging according to Regulations 463 of 2004. By Legal Notice 149 of 2007, Regulations 463 of 2004 were repealed and there is no provision for a transitory clause or saving clause for the continued prosecution of an offence.

"While the appellant is not going to enter into the argument whether the Interpretation Act applies only to acts of Parliament or also to subsidiary legislation, he did attack and is attacking the validity of the Interpretation Act in these circumstances. It is manifest that the repeal of subsidiary legislation was being made because the contrary intention appears not to preserve what had happened before.

"It is not amiss to state that it was under pressure from the European Union that the Maltese Government had to repeal those regulations as they were in conflict with EU law.

"Consequently the previous regulations were in conflict with EU treaty obligations as specified in the lengthy note of submissions and as a result their repeal was <u>unconditional</u>.

"If that was not enough, the application of the previous law, after it had been repealed goes contrary to Article 7 of the European Convention of Human Rights. Chapter 319 of the Laws of Malta specifically states that where there is any conflict, the Convention should apply.

"This line of interpretation of Article 7 of the European Convention of Human Rights was definitely established in the Scoppola vs Italy 2 case, decided by the Grand Chamber on the 17th September 2009. Consequently the interpretation of the Criminal Court goes in violation of EU treaty law and of the European Convention of Human Rights Article 7.

"It may also be stated that the clear intention also results that nothing was being saved and that was a complete departure from the *ratio legis* existing between the two regulations quoted above. One was to restrict currency from being removed from Malta while the other one is that currency is free but only a track record has to be kept for reporting purposes.

"It is humbly submitted that the Interpretation Act cannot be above the EU Treaty and the Convention of Human Rights and the Constitution and is inapplicable in so far as it contravenes any of these three laws."

22. As appellant points out, Legal Notice 463/2004 was repealed by Legal Notice 149/2007, and the latter Legal Notice contains no transitory provision. However, the Interpretation Act (Chapter 249 of the Laws of Malta) provides in article 12:

"(2) Where an Act, whether passed before or after the commencement of this Act, amends any other Act passed either before or after the commencement of this Act, or any provision of any such other Act, the Act or provision so amended, as well as anything done thereunder or by virtue thereof, shall, unless the contrary intention appears, continue to have full effect, and shall so continue to have effect as amended, and subject to the changes made, by the amending Act.

> **"(3) For the purposes of subarticle (2) 'amendment' means and includes any amendment, modification, change, alteration, addition or deletion, in whatsoever form or manner it is made and howsoever expressed, and includes also a provision whereby an Act or a provision thereof is substituted or replaced, or repealed and substituted, or repealed and a different provision made in place thereof."**

23. Moreover, article 2 of the Interpretation Act defines "Act" as **"an Act of Parliament and any other Act passed by the Legislature of Malta and includes any code, ordinance, proclamation, order, rule, regulation, bye-law, notice or other instrument having the force of law in Malta other than an instrument to which the Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland entitled the Interpretation Act, 1889, applies"**.

24. On examining Legal Notice 463/2004 and Legal Notice 149/2007, it would appear that the substance of these two Legal Notices is the same. Both carry an obligation on any person to declare to the Comptroller of Customs on entering or leaving Malta (and in the case of L.N. 149/2007 even in transiting Malta) any sum of money exceeding, in the case of L.N. 463/2004 Lm5000, and in the case of L.N. 149/2007 Lm4,293. Both carry the obligation to make such declaration on the apposite form indicated in the Schedule to the regulations. Both carry the same punishments for a false declaration or the failure to declare. Moreover both stipulate that criminal proceedings may only commence with the consent of the Attorney General. Where they differ is that, while in the case of Legal Notice 463/2004 the Comptroller was bound to pass on the details of the declarations made to the Central Bank of Malta, in the case of Legal Notice 149/2007 the records are to be passed on to the Financial Intelligence Analysis Unit. The Comptroller is also now empowered to exchange and transmit information in accordance with Regulation (EC) No. 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community.

25. Although, therefore, the recipient of the information provided by the Comptroller of Customs has changed, the obligation to declare has remained unchanged, the crimes established by both Legal Notices have remained unchanged and so too the consequent penalties. Consequently, although Legal Notice 463/2004 was repealed, the provisions of Legal Notice 149/2007 clearly show that there was no intention to repeal its effect. Both the making of a false declaration and the failure to declare are crimes now as much as they were when Legal Notice 463/2004 was in force. Legal Notice 149/2007 came into force on the 15th June 2007. The Second Count of the Bill of Indictment refers to appellant's alleged failure to declare amounts of cash prior to that date, i.e. when Legal Notice 463/2004 was still in force. In terms of the Interpretation Act, therefore, Legal Notice 463/2004 is applicable in the present case. The fact that the Comptroller of Customs was not at the time empowered by this Legal Notice to refer the information to the Financial Intelligence Analysis Unit but to the Central Bank does not in any way detract from the effects of said Legal Notice. After all, a Regulation is a legal act of the European Union that becomes immediately enforceable as law in all Member States simultaneously. Consequently the Comptroller of Customs could still have reported to the FIAU in terms of Article 5 of Regulation (EC) 1889/2005.

26. Appellant's second grievance is thus also dismissed.

27. For these reasons the Court dismisses the appeal entered by Morgan Ehi Egbomon from the judgement of the Criminal Court of the 24th October 2012 and orders that the record be forthwith sent back to that Court for the case to proceed according to law.

< Final Judgement >

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